

1 BEFORE THE SHORELINES HEARINGS BOARD
2 STATE OF WASHINGTON

3 STATE OF WASHINGTON,
4 DEPARTMENT OF ECOLOGY,

5 Appellant,

6 v.

7 PIERCE COUNTY, and
8 DANIEL D. FRANKLIN,

9 Respondents.

SHB No. 84-29

SUMMARY JUDGMENT ORDER

10 I

11 PROCEDURE

12 The procedure in this case, relative to framing the issue for
13 decision, has been that:

14 1. Department of Ecology filed its Request for Review in this
15 matter on July 5, 1984. The multiple issues raised therein were
16 preserved by the Pre-Hearing Order entered August 31, 1984.
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18

2. Subsequently, the Department has waived all issues but one namely, whether or not a variance is required for the proposed development. Memorandum in Support of Motion for Summary Judgment, dated January 11, 1985, page 1.

3. Accordingly, the Pre-Hearing Order is hereby amended to preserve only that single issue which was brought on by the Department through Motion for Summary Judgement filed January 23, 1985.

II

MATERIALS CONSIDERED

The following were considered by the Board upon this Motion for Summary Judgment:

1. Shoreline Substantial Development Permit granted by Pierce County to Daniel D. Franklin dated May 17, 1984, together with the application therefor and Pierce County Staff Report, each being attached to the Department's Request for Review;

2. Report and Decision of the Pierce County Hearing Examiner dated May 3, 1984, and clarification upon reconsideration dated July 5, 1984;

3. Motion for Summary Judgment filed by the Department of Ecology on January 23, 1985, together with "Memorandum in Support of Motion for Summary Judgment" dated January 11, 1985, and "Affidavit in Support . . . dated January 21, 1984 [sic];

4. "Brief in Opposition to Motion for Summary Judgment" filed on February 15, 1985, by Pierce County;

1 5. "Memorandum in Support of Respondent's Motion for Summary
2 Judgment" filed on February 22, 1985, by respondent, Daniel D.
3 Franklin; and

4 6. The prior decisions of the Board cited herein, and the Pierce
5 County Shorelines Master Program (WAC 173-19-350) of which official
6 notice was taken pursuant to WAC 461-08-185(2).

7
8 and being fully advised the Board finds that there is no genuine issue
9 of material fact regarding the issue of whether a variance is required
10 for the proposed development and that the following are:

11 III

12 UNDISPUTED FACT

13 On May 17, 1984, respondent Pierce County granted a shoreline
14 substantial development permit to Daniel D. Franklin to "retain and
15 bring up to standards a 192' floating dock."

16 Wherefore the Board concludes as a matter of law:

17 IV

18 CONCLUSIONS OF LAW

19 1. The original Pierce County Shoreline Master Program (PCSMP)
20 was approved by the Department of Ecology (DOE) on April 4, 1975.
21 Although not offered into evidence on this record, we take official
22 notice of its terms as set forth in our earlier decision of Kooley and
23 Pierce County v. Department of Ecology, SHB No. 218 (1976). That
24 original master program provided:

1 Residential docks on salt water, when allowed,
2 shall meet the following design criteria:

3 1. Maximum length shall be fifty (50) feet or
4 only so long as to obtain a depth of eight (8)
5 feet, whichever is less at mean lowest low
6 water.

7 Design Criteria, P. 99 (Emphasis added).

8 In Kooley, the proposed development consisted of a pier, dock and
9 float exceeding 50 feet in length (Finding of Fact I). Applying the
10 master program to the proposed development in Kooley, we concluded
11 that (1) a variance was necessary, and (2) Department of Ecology's
12 denial of same was correct. We also stated, however:

13 ... a long, shallow tidal run-out is common in the
14 area, and appellant and others similarly situated
15 must seek relief by virtue of that circumstance
16 through an amendment of the master program itself.
17 That can only be accomplished by the county
18 legislative body with the approval of the
19 Department of Ecology.

20 2. Within one year after Kooley, Pierce County amended its master
21 program to delete the language applied in Kooley. In lieu of that
22 language which prescribes that docks shall have a maximum length of 50
23 feet or obtain a depth of 8 feet whichever is less, the following was
24 adopted:

25 A. Criteria - prior to the granting of a
26 Substantial Development Permit, the County's
27 reviewing authority shall make a determination
that the proposed project is consistent with
the policies of the Master Program and with
the following criteria:

1. Important navigational routes or marine
oriented recreation areas will not be
obstructed or impaired;

2. Views from surrounding properties will not be unduly impaired;
3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
4. Public use of the surface waters below ordinary high water shall not be unduly impaired;
5. A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;
6. The use or uses of any proposed dock, pier or float requires by common and acceptable practice, a Shoreline location in order to function;
7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

B. Development guidelines - In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project application for Substantial Development Permit in arriving at a satisfactory degree of consistency with the policies and criteria set forth in this Chapter. To this end the County may extend, restrict or deny an application to achieve said purposes.

. . .

. . .

6. Single use piers and docks.

- a. Maximum intrusion into water should be only so long as to obtain a depth of eight feet of water as measured at

mean lower low water on salt water shorelines or as measured at ordinary high water in fresh water shorelines except that the intrusion into the water of any pier or dock should not exceed the lesser of 15 percent of the fetch or 150 feet on saltwater shorelines and 40 feet on fresh water shorelines.

65.56.040 GENERAL CRITERIA AND GUIDELINES FOR REVIEWING SUBSTANTIAL DEVELOPMENT PERMITS. (Amended Res. #19803, June 14, 1977). (Emphasis added).

Department of Ecology approved this amended language on October 26, 1977. WAC 173-19-350. This is the language applicable to this proposed development.

3. We review the proposed development for consistency with the applicable (Pierce County) shoreline master program and the Shoreline Management Act (SMA). RCW 90.58.140(2)(b).

4. The PCSMP does not require a variance for the proposed development. Both the language of Section 65.56.040(B) and its evolution from earlier language support this conclusion. In direct, unbroken sequence following our decision in Kooley, cited above, Pierce County amended its shoreline master program to delete the specific standard for dock length and substitute the concept that, "In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied...." PCSMP Section 65.56.040(B) (Emphasis added). The purpose of a variance is stated within WAC 173-14-150 of the DOE:

1 The purpose of a variance is strictly limited to
2 granting relief to specific bulk, dimensional or
3 performance standards set forth in the applicable
4 master program . . . (Emphasis added).

5 The stated purpose of a variance would be thwarted by applying it to
6 Pierce County's unspecific guideline rather than a specific standard.
7 Pierce County has repealed its specific standard for dock length in
8 order to tailor its decisions to tidal run-outs of varying length.
9 Dock proposals should be judged by the Pierce County guidelines as
10 interpreted in Northey v. Pierce Co. and Marshall, SHB No. 84-6
11 (1984), and not by the rules for shoreline variance. Department of
12 Ecology v. Pierce Co. and Martel, SHB No. 84-26 (1984). Department of
13 Ecology v. Pierce Co. and Murphy, SHB No. 84-28 (1984).

14 5. In Northey, Martel, and Murphy cited above, we concluded that
15 the word "should" is permissive rather than mandatory in the guideline
16 at PCSMP Sec. 65.56.040(B). We concluded, however, that (1) special
17 circumstances must exist which render a 150-foot dock impractical, and
18 (2) that a longer dock must have no significant, additional adverse
19 impact before a dock longer than 150 feet can be allowed. In none of
20 the cases involving this subject matter has Pierce County failed to
21 adhere to that limitation.

22 6. The proposed development has not been shown to be inconsistent
23 with chapter 90.58 RCW, the Shoreline Management Act.

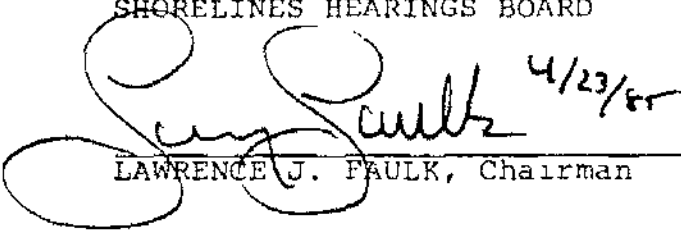
24 7. A shoreline variance is not required for the proposed
25 development.

1 NOW THEREFORE IT IS ORDERED that Department of Ecology's Motion
2 for Summary Judgment is denied and its request for review is
3 dismissed as a matter of law.

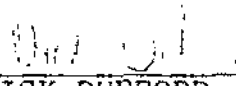
4 Mr. Franklin's request for costs and attorney's fees is beyond
5 the jurisdiction of this Board.


6 DONE at Lacey, Washington, this 25th day of April, 1985.

7 SHORELINES HEARINGS BOARD


8  4/23/85
9 LAWRENCE J. FAULK, Chairman

10
11 Did Not Participate
12 GAYLE ROTHROCK, Vice Chairman

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14 
15 WICK DUFFORD, Lawyer Member

16
17 
18 NANCY R. BURNETT, Member

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20 
21 RODNEY M. KERSLAKE, Member

22 
23 WILLIAM A. HARRISON
24 Administrative Appeals Judge

25
26 
27 CYNTHIA SULLIVAN, Member